IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	
KITTY HAWK, INC., et al	§	**CASE NO. 400-42069-BJH and**
	§	**CASE NOS. 400-42141 through**
	§	**CASE NO. 400-42149**
	§	**Jointly Administered Under**
	§	**Case No. 400-42141-BJH**
Debtors.	§	

MEMORANDUM OPINION

Before the Court is the motion for summary judgment (the "Motion") filed by Kitty Hawk, Inc. ("Kitty Hawk") in connection with its objection to an administrative expense priority claim asserted by Best Aeronet Aviation Services, Ltd. ("Best Aeronet") in the above bankruptcy cases. The Motion was argued on July 16, 2003, at which time the Court took the Motion under advisement.

This Court has core jurisdiction over the Motion and the underlying claim objection in accordance with 28 U.S.C. §§ 1334 and 157. This Memorandum Opinion contains the Court's rulings on the Motion.

I. FACTUAL BACKGROUND

Best Aeronet asserts a post-petition administrative priority claim against Kitty Hawk for over $1.3 million (the "Claim").[1] The Claim arises from a Purchase and Sale Agreement (the

[1] Despite its desire for treatment of its claim as an administrative expense, Best Aeronet filed two proofs of claim on the Official Proof of Claim Form: the first on July 12, 2001, which was assigned Claim No. 931, and the second on July 17, 2001, which was assigned Claim No. 949. Claim No. 949 is in the same amount as Claim No. 931and it indicates that it amends Claim No. 931. Kitty Hawk has objected to both claims on the grounds that (i) they are incorrectly filed as administrative claims, (ii) Kitty Hawk disputes any liability on the Claims, and (iii) with respect to Claim No. 949, it duplicates Claim No. 931.

"Agreement") dated effective as of the 3rd day of August, 2000, by and among Best Aeronet and, as relevant here, Kitty Hawk's predecessors in interest. In general, and pursuant to the Agreement, Best Aeronet was to purchase certain operating assets and airline certificates of Kitty Hawk Charters, Inc., OK Turbines, Inc. and a hanger lease of Kitty Hawk International, Inc. The Court approved the sale and the Agreement by Order entered, after notice and a hearing, on September 12, 2000.

The parties never closed the sale pursuant to the Agreement and Best Aeronet subsequently filed the Claim. In summary, Best Aeronet contends that Kitty Hawk either (i) breached the Agreement in a number of respects, thus giving rise to the Claim, or (ii) committed certain torts which render it liable for the Claim.

Kitty Hawk disputes its breach of the Agreement or its liability to Best Aeronet in tort and objected to the Claim, thereby commencing this contested matter in accordance with Federal Rules of Bankruptcy Procedure 3007 and 9014 and *In re Taylor*, 132 F.3d 256 (5th Cir. 1998). On June 12, 2003, Kitty Hawk filed the Motion pursuant to which it seeks a summary judgment disallowing the Claim.

II. THE LEGAL STANDARD

Because Kitty Hawk seeks summary judgment disposing of each of the legal theories underlying the Claim, Best Aeronet bears the ultimate burden of proof on each of those legal theories. While Kitty Hawk bears the initial burden of demonstrating the absence of material fact issues, "[t]o avoid summary judgment, the nonmovant must adduce evidence which creates a material fact issue concerning each of the essential elements of its case for which it will bear the burden of proof at trial." *Abbott v. Equity Group, Inc.*, 2 F.3d 613, 619 (5th Cir. 1993). The

summary judgment movant:

> need not support the motion with evidence negating the opponent's case; rather, once the movant establishes that there is an absence of evidence to support the non-movant's case, the burden is on the non-movant to make a showing sufficient to establish an issue of fact for each element as to which that party will have the burden of proof at trial.

Epps v. NCNM Texas Nat'l Bank, 838 F. Supp. 296, 299 (N.D. Tex.), *aff'd* 7 F.3d 44 (5th Cir. 1993) (citing *Celtox Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986)). "[U]nsubstantiated assertions are not competent summary judgment evidence." *Abbott,* 2 F.3d at 619. The nonmoving party must "'come forward with specific facts showing there is a genuine issue for trial' . . . [and] 'must do more than simply show some metaphysical doubt as to the material facts.'" *Epps,* 838 F.Supp. at 299 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)).

III. LEGAL ANALYSIS

In the Motion, Kitty Hawk contends that it is entitled to a summary judgment disallowing the Claim because: (i) the tort theories of recovery underlying the Claim (negligence and misrepresentation) are not proper because it owed no duty to Best Aeronet other than those imposed by the Agreement (for which the proper remedy is a breach of contract claim, not a tort claim); (ii) the parol evidence rule prevents changes to the Agreement which are necessary to support the Claim; (iii) res judicata or issue preclusion prevents Best Aeronet from asserting the Claim; and (iv) Best Aeronet has failed to prove any benefit to the estate from the Agreement, thereby precluding the Claim. For the reasons explained more fully below, the Court concludes that Kitty Hawk is entitled to a partial summary judgment disposing of the tort theories of recovery underlying the Claim, but that Best Aeronet has raised genuine issues of material fact regarding the contract theories of recovery underlying the Claim (and/or the defenses asserted to those theories).

A claim for negligence requires the plaintiff to plead and prove that: (i) defendant owed a duty to plaintiff, (ii) this duty was breached, (iii) plaintiff suffered damages, and (iv) plaintiff's damages were caused by defendant's breach. *Morin v. Moore*, 309 F.3d 316 (5th Cir. 2002) (plaintiff must show duty, breach, causation, and damages). In general, a duty from one entity to another may be assumed by contract or imposed by law. *Southwestern Elec. Power Co. v. Grant*, 73 S.W.3d 211, 223 (Tex. 2002) (Enoch, J. concurring). Contractual privity assures a sufficiently close nexus between the parties to impose a legal duty of care. *Hartford Life Ins. Co. v. Fulda*, No. 09-94-168CV, 1995 WL 261996 at *19 (Tex.App - Beaumont May 4,1995) (not designated for publication); *Cook Consultants, Inc. v. Larson*, 700 S.W.2d 231 (Tex.App. -Dallas 1985).

A claim for negligent misrepresentation requires the plaintiff to plead and prove that: (i) defendant made a representation in the course of its business or in a transaction in which it had a pecuniary interest, (ii) the false information was supplied for the guidance of others in their business, (iii) defendant did not exercise reasonable care or competence in obtaining or communicating the information, and (iv) plaintiff suffered pecuniary loss by justifiably relying on the representation. *Clardy Mfg. Co. v. Marine Midland Bus. Loans Inc.*, 88 F.3d 347, 357 (5th Cir. 1996) (citing *Fed. Land Bank Ass'n of Tyler v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991)).

However, under Texas state law, claims for negligence, gross negligence, negligent misrepresentation, and the like can be barred by the "independent injury" doctrine as set forth in *Southwestern Bell Telephone Co. v. Delanney*, 809 S.W.2d 493 (Tex. 1991). The independent injury doctrine precludes a tort claim if the claim is for breach of a duty created solely by a contract and the nature of the injury is only the economic loss related to the subject matter of the contract itself. *Id.* In other words, if the conduct alleged would give rise to liability independent of the fact that a

contract exists between the parties, the claims sound in tort and may be asserted as such. *Ortega v. City Nat. Bank,* 97 S.W.3d 765 (Tex.App.-Corpus Christi 2003). But if the alleged conduct would give rise to liability only because it breaches the parties' agreement, then it sounds in contract, and it cannot be disguised as a tort claim through artful pleading. To escape the rule, there must be facts which establish a duty independent of a contract, and the nature of the injuries must be something beyond those which relate only to economic loss to the subject of the contract between the parties.

As relevant here, Best Aeronet failed to raise a genuine issue of material fact regarding a duty owed to it by Kitty Hawk other than a duty created by the Agreement. Moreover, Best Aeronet's damages all flow from the Agreement. Specifically, Best Aeronet asserts its entitlement to a break up fee of $950,831.25 provided for in the Agreement and it further asserts its entitlement to reimbursement for certain due diligence costs it incurred in attempting to proceed to the Closing (as defined in the Agreement).

Because any legal duty owing from Kitty Hawk to Best Aeronet arises under the Agreement, and Best Aeronet's damages all flow from the Agreement, Best Aeronet's tort theories of recovery are barred by the "independent injury doctrine" under Texas state law. Kitty Hawk is entitled to a summary judgment on these tort theories of recovery.

However, after reviewing the response of Best Aeronet in opposition to the Motion, and the appendix of exhibits and affidavits in support of that response, the Court concludes that Best Aeronet has raised a genuine issue of material fact with respect to the breach of contract theories of recovery which underlie the Claim (and/or the defenses asserted to those theories). In short, the Court does not believe that the parol evidence rule is applicable here. Best Aeronet asserts that the Agreement was modified *after* its execution by the "consent" of the parties. Whether Best Aeronet

will be able to carry its burden of proof at trial and establish, by a preponderance of the evidence, the necessary modifications to support its breach of contract theories of recovery is unclear, but that is not its burden in connection with the Motion. Because there is sufficient evidence in the summary judgment record to create an issue of fact with respect to this contention, the Motion must be denied.

Moreover, while the Court understands the res judicata defense asserted by Kitty Hawk, the Court is not yet persuaded that the defense is applicable here. As the Court understands the parties' contentions, Best Aeronet is not contending that inventory was sold by the debtors outside the ordinary course of business as Kitty Hawk suggests. Rather, Best Aeronet contends that the inventory levels fell below those required by the Agreement and were not replenished in accordance with the Agreement. The Court's findings and conclusions regarding confirmation of the debtors' joint plan of reorganization do not address this issue at all.

Finally, Kitty Hawk obviously thought the Agreement provided some benefit to the debtors' estates or it would not have asked the Court for authority to enter into it. Upon Kitty Hawk's motion, the Court did approve the sale to Best Aeronet and authorized Kitty Hawk to enter into the Agreement. If Best Aeronet carries its burden of proof at trial and establishes, by a preponderance of the evidence, that Kitty Hawk breached the Agreement, damages flowing from that breach may be recoverable as an administrative priority claim. *See In re Merry-Go-Round Enterprises, Inc.*, 180 F.3d 149 (4th Cir. 1999) (holding that a claim for future rent under post-petition lease which was subsequently breached was entitled to treatment as an administrative expense and noting that the debtor had represented in its motion for approval of the lease that the lease was in the best interest of the estates and creditors); *In re Dornier Aviation (North America), Inc.,* Nos. 02-82003-SSM, 02-82004-SSM, 2002 WL 31999222 (Bankr. E.D.Va. Dec 18, 2002) (only where a pre-petition

contract is assumed, or the party enters into a new contract with the trustee or debtor in possession, are the claims for its breach entitled to administrative expense status); *In re Chugiak Boat Works, Inc.*, 18 B.R. 292, 295 (Bankr. D. Alaska 1982) ("in light of the virtual identity in effect of contracts initially entered into during reorganization and contracts assumed during that time, the administrative expense provisions of the Code must be read to authorize the Court also to treat contracts entered into during reorganization as administrative expenses . . . ")); *see also Calpine Corporation v. O'Brien Envtl. Energy, Inc., (In re O'Brien Envtl. Energy, Inc.)*, 181 F.3d 527 (3rd Cir. 1999) ("the allowability of break-up fees, like that of other administrative expenses, depends upon the requesting party's ability to show that the fees were actually necessary to preserve the value of the estate")*; In re Klein Sleep Products, Inc.* 78 F.3d 18, 26 (2nd Cir. 1996) (pre-petition claims are classified as general claims; post-petition claims "arising, for example, from torts committed by the estate in bankruptcy, or from contracts entered into by the trustee or debtor-in-possession--are entitled to administrative expense priority").

Because questions of fact exist regarding the breach of contract theories of recovery which underlie the Claim (and/or the defenses asserted to those theories), summary judgment in Kitty Hawk's favor is not appropriate. The contract theories and defenses will proceed to trial.

An Order consistent with this Memorandum Opinion will be entered separately.

Signed: July 29, 2003.

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Barbara J. Houser
United States Bankruptcy Judge